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## TABLE OF CONTENTS

# SENTENCING

ANDRA LE ROUX-KEMP*

## LEGISLATION

See the discussion under the chapter Criminal Procedure.

## CASE LAW

*Convictions and sentences on counts of multiple rape*

The conviction of the two appellants in *Cock v S, Manuel v S* [2015] 2 All SA 178 (ECG) (3 February 2015) arose out of a single incident in that they acted in the furtherance or execution of a common purpose to rape the complainant (para [2]).

The first appellant was apprehended during 2012 and pleaded guilty and was convicted of robbery with aggravating circumstances as well as rape. In respect of the robbery charge, the first appellant was sentenced to seven years' imprisonment as substantial and compelling circumstances were found to warrant a deviation from the prescribed minimum sentence of fifteen years' imprisonment in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997 (paras [3]-[5]). The appellant was also sentenced to the prescribed minimum sentence of life imprisonment in terms of section 51(1) of the same Act based on the allegation that the complainant was raped by more than one person acting in the execution or furtherance of a common purpose and/or grievous bodily harm was inflicted on her during the rape (para [4]). The second appellant was apprehended after the conviction and sentence of the first appellant had been finalised and was also charged with robbery with aggravating circumstances and rape. The second appellant also pleaded guilty to both counts and was convicted and sentenced to five years' imprisonment on the first count, and to the prescribed minimum sentence of life imprisonment on the second count (paras [6] [7]).

On appeal, Judge Pickering of the Eastern Cape High Court, Grahamstown, found that no admissible evidence had been

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placed before the sentencing court to the effect that a knife had been placed or pressed against the complainant's neck during the course of the rape, or that grievous bodily harm had otherwise been inflicted upon her (para [13]). And, with regard to whether the prescribed minimum sentence of life imprisonment was applicable on the rape charge on the basis that the complainant was raped by more than one person acting in the execution or furtherance of a common purpose, it was held that the prescribed minimum sentence of life imprisonment in terms of section 51(1) of the Act would still apply despite the fact that at the time of the first appellant's trial, his co-perpetrator had yet to be apprehended and convicted (para [15]).

However, the appeal court in this instance was bound by a decision of the Supreme Court of Appeal in *Mahlase v S* (255/13) [2013] ZASCA 191 (29 November 2013), where it was held that since the co-perpetrators of a gang rape in that case were not before the trial court and had not yet been convicted of the rape, the accused in that matter could not be sentenced in terms of the provisions of Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (para [21]). With regard to this finding, Judge Pickering stated that he had 'with the greatest respect, considerable difficulty in understanding the basis upon which the conclusion was reached' (para [23]). He held that once the evidence of a complainant is accepted, and her evidence establishes beyond a reasonable doubt that she was indeed raped more than once by more than one person, one of whom is the accused before the court, then the fact that the co-perpetrators are yet to be apprehended and/or convicted of the rape, is entirely irrelevant (para [25]). Judge Pickering further stated that '[a] trial court is obliged to sentence an accused who appears before it on the basis of the facts which it found to have been proven when convicting the accused' (para [26]). Judge Pickering also rejected the submission that the *Mahlase* case is distinguishable from the *Cock* and *Manual* case as the first appellant had pleaded guilty to gang rape. In this regard, Judge Pickering stated that there is in principle no difference between a case where the conviction of the accused is based on credible evidence tendered by the state or based on a plea of guilty by the accused (para [29]).

However, being bound by the decision of the Supreme Court of Appeal in *Mahlase,* the first appellant's sentence of life imprisonment on the count of rape in the present case was set aside and considered afresh (para [31]). Not finding any substantial or

compelling circumstances warranting a deviation from the prescribed minimum sentence, and with due regard to the particular aggravating circumstances present in this case, Judge Pickering sentenced the first appellant to a term of life imprisonment on the rape count (para [36]). For the second appellant, the prescribed minimum sentence of life imprisonment was applicable as his accomplice, the first appellant, had already been convicted and sentenced for raping the complainant (para [38]). A term of life imprisonment for the rape count was subsequently also confirmed and imposed on the second appellant (paras [42]-[45]).

In another case, *Maxabaniso v S* 2015 (2) SACR 553 (ECG) (5 May 2015), Judge Plasket of the Eastern Cape High Court, Grahamstown, had to decide whether an accused, who had penetrated the complainant twice, should be charged with one or two counts of rape. The appellant in this case was convicted of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and was sentenced to fifteen years' imprisonment (para [1]). The appellant had sexual intercourse with the complainant against her will and penetrated her twice during the same encounter and within a relatively short period of time (paras [2]). While the charge sheet only made mention of one count of rape, reference was also made to sections 51 and 52 as well as Schedule 2 of the Criminal Law Amendment Act 105 of 1997 which refers to the particular circumstances in which specific minimum sentences apply (para [12]). When the charge was put to the appellant, the prosecutor added that '. . .this offence is read with the provisions of section 51 and/or 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended meaning that should a conviction follow in this matter that the State would ask the court to consider life imprisonment in this matter due to the fact that the complainant was raped more than once' (para [13]).

In *S v Kimberley & another* 2005 (2) SACR 663 (SCA), Judge Zulman stated that the mischief which the legislature sought to deal with in Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 read with section 51 (1), 'was the situation where a woman is subjected to multiple rapes either by one person or by any ''co-perpetrator or accomplice''. [And] [p]aragaph *(a)*(i) of Schedule 2 covers the situation where ''the victim was raped more than once''' (para [9] of the *Kimberley* case as quoted in para [19] in the case under discussion). For example, in *S v M* 2007 (2) SACR 60 (W) and *S v Senyolo* 2010 (2) SAR 571 (GSJ),

the accused raped the same victim once on two different occasions a few months apart and the accused in both these cases were charged with and convicted on two counts of rape. The courts in both cases also held that the prescribed minimum sentence of life imprisonment applied because the accused had raped the same victim more than once (para [21]).

However, Judge Plasket of the Eastern Cape High Court, Grahamstown, distinguished the *Maxabaniso* case from that of *S v M* and *S v Senyolo* as the two acts of rape in the *Maxabaniso* case were not separated by a significant period of time but rather constituted two separate acts of penetration during the course of the same incident (paras [22] [23]; also see *S v Nkomo* 2007 (2) SACR 198 (SCA) and *S v Willemse* 2011 (2) SACR 531 (ECG)). Judge Plasket subsequently submitted that 'the legislature envisaged an accused being charged with one charge of rape if, in the course of his encounter with his victim, he penetrates her more than once' (para [25]). And in this (*Maxabaniso*) case, the two acts of penetration occurred during the course of a single encounter between the appellant and the complainant and the one count of rape was therefore correct (para [26]).

Also see *Makeleni v S* (CA & R 411/2014 [2015] ZAECGHC 49 (13 May 2015); *Seitshiro v S* (A167/2014) [2015] ZAFSHC 31 (12 February 2015); and *S v Madisha* (CC161/2015) [2015] ZAGPPHC 1142 (3 December 2015).

### Disproportionality Between Sentences Imposed on an Accused and His or Her Co-Accused

An appellate tribunal may interfere with a sentence on the ground that the sentence imposed is disturbingly inappropriate when compared to the sentence imposed upon a co-accused. However, the limits of an appellate tribunal's powers in this regard were also recognised in *S v Marx* 1989 (1) SA 222 (A) 225B–226B where it was emphasised that uniformity in sentences amongst co-accused should not be elevated to a principle. Only where 'there is a disturbing disparity in such sentences, and the degrees of participation are more or less equal, and there are not personal factors warranting such disparity, appellate interference with the sentence may, depending on the circumstances, be warranted. [Moreover in] . . . ameliorating the offending sentence on appeal, the Court does not necessarily equate the sentence: it does what it considers appropriate in the circumstances' (also see *S v Giannoulis* 1975 (4) SA 867 (A)).

This was again confirmed in *Terblanche v S* (CA&R 197/2012) [2015] ZAECGHC 13 (5 March 2015), where the appellant was sentenced to ten years' imprisonment following his conviction on a charge of fraud (para [1]). The appellant was one of six accused arraigned on a main charge of fraud and several other counts (para [3]). At the conclusion of the trial, the fifth accused was acquitted on all charges while the remainder of the accused were all convicted of fraud as referred to in paragraphs *(a)* and *(b)* of Schedule II of the Criminal Law Amendment Act 105 of 1997, and sentenced to various terms ranging from twelve years to three years' imprisonment and subject to periods of suspension on certain conditions for some of the remaining accused (para [4]). The appellant predicated that his sentence was shockingly inappropriate, regard being had to his limited role in the commission of the offence, the relatively lighter sentences imposed on some of the other accused, and the fact that the appellant did not derive any financial or other benefits from having participated in the commission of the crime (para [5]).

In considering the reasoning for the sentence imposed by the trial court, Judge Chetty of the Eastern Cape High Court, Grahamstown, indicated that it was apparent from the trial court's judgment that the appellant's involvement in the perpetration of the fraud was crucial to its success (para [12]). It was held that '[t]he parallelism sought to be drawn between the participation of the appellant and the erstwhile accused . . . in the fraud proceeds not only from an erroneous understanding of the evidence adduced, but, more importantly, a total disregard of the trial court's factual findings' (para [16]). Judge Chetty also recognised that the personal circumstances of all the accused were entirely disparate and that reliance on the alleged disproportionality of the sentences imposed in this matter was entirely misplaced and did not establish a proper basis warranting interference with the original sentence imposed (para [16]).

Also see *Maliswane & another v S* (59/2015) [2015] ZAECGHC 85 (27 August 2015).

### Internal Policies and Guidelines of the Department of Correctional Services as to the Release of Prisoners are Irrelevant for the Purpose of Sentencing

The appellant in *Bevu v S* (CA&R 357/2014) [2015] ZAECGHC 11 (3 March 2015) pleaded guilty and was convicted of theft and sentenced to twelve months' imprisonment in terms of section

276(1)(i) of the Criminal Procedure Act 51 of 1977, and to a further six months' imprisonment which was conditionally suspended for a period of four years (para [1]). In handing down the sentence the magistrate categorised the theft as a 'serious crime' as he found that the offence had been committed with a measure of premeditation and that the items were luxury items (para [4]). However, the magistrate also took into consideration that the appellant was a young man and a first offender and hence proceeded to record in his reasoning for the sentence imposed that the practical effect of the sentence in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 was that the appellant would effectively serve two months' imprisonment and ten months' correctional supervision (para [7]; also see *S v Kulati* 1975 (1) SA 557 (E) and *S v Karg* 1961 (1) SA 231 (A)).

Judge Eksteen of the Eastern Cape High Court, Grahamstown, found this reasoning for the sentence imposed to be unpersuasive as the magistrate failed to provide any basis for his perception that the appellant would only serve two months' imprisonment (para [8]). Furthermore, he held that there is no provision in the Criminal Procedure Act 51 of 1977 from which such a conclusion can be drawn, and even if as a matter of policy or set guidelines the Commissioner of Correctional Services were to consider the release of the appellant after two months, such internal policies or guidelines of the Department of Correctional Services should not come into play when determining what an appropriate sentence upon a conviction of theft would be (para [8]). Thus, relying upon the expectation that an accused would be released from prison after having served a period of his or her sentence is a misdirection warranting that a sentence so imposed be set aside and considered afresh (para [8]).

## Noteworthy Specific Sentences

Determining a suitable sentence can be a remarkably complex aspect of the criminal process. Not only does this part of the process involve general principles of sentencing as well as specific statutory prescriptions, but also value judgments and weighing of sometimes contradictory factors. The punishment must also be personalised. A number of specific sentences are discussed below in order to illustrate the dynamic nature of sentencing.

### *Drug offences*

The appellant in *Mandlozi v S* 2015 (2) SACR 258 (FB) was convicted of dealing in more than 25kg of methamphetamine in

contravention of section 5*(b)* of the Drugs and Drug Trafficking Act 140 of 1992 and sentenced to eighteen years' imprisonment (paras [1] [2]). The appellant appealed against this sentence submitting that it was shockingly severe given the circumstances of the case and for this reason inappropriate (para [7]).

In addition to considering the personal circumstances of the appellant, which were generally favourable, the trial court also took into account the nature and seriousness of the crime committed (paras [9] [10]). In this regard, it was also held that '[t]he quantity of drugs found in an accused person's possession must invariably be considered as a barometer for the moral blameworthiness of the individual concerned. It follows that, therefore, the larger the quantity of drugs an offender deals with or possesses, the heavier the sentence would be' (para [12]; also see *S v Keyser* 2012 (2) SACR 437 (SCA)).

On appeal, Judges Rampai and Mbhele of the Free State High Court, Bloemfontein, further added that the appellant was 'not just a naïve woman who was taken advantage of by a drug lord. She was not an amateur in drug trafficking. She was a cunning mule' (para [17]). Yet, the judges also found that the court *a quo* had failed to appreciate the significance of the distinction between the two types of dependence-producing substance that exist: undesirable substances like 'crystal meth' on the one hand, and more dangerous substances like cocaine on the other (para [19]). While the lawmaker views trafficking in both these two types of substance in a serious light, the same punishment will not apply to couriers found in possession of the same quantity of drugs, the one being a dangerous substance and the other an undesirable substance (para [20]). However, it was also emphasised that 'crystal meth' or 'tik' can be manufactured with ease, is relatively cheap, highly addictive and readily available, and has dire consequences for the addict (paras [25] [29] [30]). And, more generally, the 'negative and devastating repercussions of drugs on the society in general, and the addicts in particular, are so notorious that no reasonable person can claim to be ignorant of them' (para [28]).

Therefore, given that the prescribed maximum sentence, according to statute, was 25 years' imprisonment, Judges Rampai and Mbhele ultimately found a more appropriate sentence to be a term of eighteen years' imprisonment, of which four years are suspended for five years on condition that the appellant is not again found guilty of contravening section 5*(b)* of the Drugs and

Drug Trafficking Act 140 of 1992 committed during the period of suspension (para [40]).

*Environmental offences*

The appellant in *Lemthongthai v S* 2015 (1) SACR 353 (SCA) was charged with 26 counts of contravening section 80(1)*(i)* of the Customs and Excise Act 91 of 1964 in that he traded illegally in rhino horn, and 24 counts related to contraventions of section 57(1) read with sections 101(1) and 102 of the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA). The trial court did not regard the appellant's plea of guilty as a mitigating factor but rather saw it as a 'manifestation of the appellant being realistic' (para [10]). Other factors that were taken into account included the seriousness of the offences, the importance of the preservation of South Africa's biodiversity, and the appellant's manipulation of the permit system in the scheme of his criminal activities (paras [10] [11]). The appellant was ultimately sentenced to an effective 40 years' imprisonment of which ten years' imprisonment was imposed for the offences relating to section 80(1)*(i)* of the Customs and Excise Act 91 of 1964, and the remainder of the counts were divided arbitrarily into three groups for the purpose of sentencing, totalling an effective 30-year term (para [11]).

On appeal against this sentence in the South Gauteng High Court, Johannesburg, it was reasoned that since the trial court took the counts in relation to section 80(1)*(i)* of the Customs and Excise Act 91 of 1964 together, the term of imprisonment for these offences should have been restricted to five years (and not ten years) as the particular provision of the Act only provides for a maximum sentence of five years' imprisonment. The High Court also divided the remainder of the counts into arbitrary groups in order to arrive at a sentence of thirty years' imprisonment, a sentence that it deemed to be both permissible and appropriate (paras [15] [16]).

Justice Navsa writing for the majority of the Supreme Court of Appeal agreed that the offences were of so serious a nature that a custodial sentence was called for, but held that both the trial court and the High Court had erred in having regard to the existence of a rhino trading syndicate, of which there was no evidence, of equating the appellant to a typical poacher, and in grouping certain of the counts together arbitrarily for the purpose of sentencing (paras [18]-[21]). Moreover, given that all the rhinos

were killed during one operation, it was held that a sentence of six months' imprisonment on the counts relating to the provisions of the NEMBA was appropriate and that a fine of R1 million be imposed for the counts relating to section 80(1)*(i)* of the Customs and Excise Act 91 of 1964.

*Stock theft*

The three appellants in *Velebhayi & others v S* 2015 (1) SACR 7 (ECG) were convicted on seven counts of stock theft in terms of the Stock Theft Act 57 of 1959, in that they stole a total of 168 sheep from a number of farms in the Kirkwood district over a period of some two months (para [1]). The first and second appellants were each sentenced to an effective term of 23 years' imprisonment which consisted of three consecutive terms of nine, nine and five years' imprisonment (para [2]). This effective term of 23 years' imprisonment was computed as follows: the first and second appellants were sentenced to nine years' imprisonment in respect of five of the counts, and five years' imprisonment in respect of the remaining two counts. Four sentences of the nine years' imprisonment and one of five years' imprisonment were ordered to run concurrently (para [2]). The third appellant had a relevant previous conviction and was sentenced to an effective 28 years' imprisonment consisting of nine-year sentences in respect of four counts ordered to run concurrently, a further nine years' imprisonment, and two sentences of five years' imprisonment all running consecutively (para [2]).

The Stock Theft Act 57 of 1959 offers limited assistance in terms of prescribing appropriate sentences for offences created in terms of the Act. Section 14 of the Act merely provides that neither a district nor a regional court may impose sentences for stock theft that are in excess of their normal sentencing jurisdiction (para [5]). In this matter, therefore, the court considered the personal circumstances of each appellant, the interests of society, and the nature and seriousness of the offences (para [6]). With regard to the latter, the following factors received special consideration: it was clear from the evidence that the offences were well-planned and that the appellants were part of a stock theft syndicate (paras [10] [11]); and the thefts were also not, unlike many other stock theft cases, motivated by hunger or need, rather, '. . . the organized nature of the offences, the sheer scale of the operation and the fact that the appellants were all employed lead to the inescapable inferences that the motive for

the offences was greed' (para [13]). The photographs submitted as evidence also showed that many of the slaughtered sheep were pregnant ewes, the farmers therefore had also lost the progeny of their ewes (para [12]). The scale of the operation and its brazen nature furthermore led to farmers in the area having to take extraordinary measures, some with serious financial implications, in order to protect their stock (para [14]). And while section 15 of the Stock Theft Act 57 of 1959 makes provision for a court order that offenders compensate complainants for their loss, 'there was no purpose in making such an order in this case given the means of the appellants and the quantum of the losses suffered by the farmers' (para [15]).

These offence-specific factors also had to be considered in relation to the interests of society. In this regard, it was held that while the prevalence of the offence has had the effect that courts, as a general rule, would imprison first offenders for a period of six months to a year for the theft of even only one sheep and in the absence of special circumstances, a tendency is observable in recent years of courts imposing increasingly harsher sentences (para [17]). Some of the reasons cited for this tendency include the difficulty law enforcement officials experience in apprehending and prosecuting offenders, and the difficulty farmers experience in trying to protect their stock and prevent this crime (para [18]). The economic impact of stock theft on rural communities was also considered an important factor that contributes to the inherent seriousness of the offence, as it 'is not only the owners of stock who suffer but their workers as well, whose continued employment is placed at risk as farmers either go out of business, reduce or close down their stock farming operations or change to less labour intensive farming that does not carry the same risks of stock theft, such as game farming' (para [19]). There is furthermore a danger that people will resort to self-help and vigilantism if 'sentences do not properly and fairly reflect societal censure for stock theft and do not adequately protect the interest of society' (para [21]).

Yet, in considering relevant case law, Judge Plasket writing for the majority of the Eastern Cape High Court, Grahamstown, found that the sentences imposed in this matter were substantially more severe than comparable sentences from recent years (para [30]; *S v Khumalo en andere* 1983 (2) SA 540 (N); *S v Oosthuizen* 1993 (1) SACR 10 (A); *S v Oosthuisen en 'n ander* 1996 (1) SACR 475 (O); *S v Tyers* 1997 (1) SACR 261 (NC); *S v Molenbeek en andere* 1997 (2) SACR 346 (O) and *S v Vunati* [2003] JOL 11171 (E)).

Judge Plasket described the approach adopted by the magistrate in this case as 'rough and ready' in that it was not well-reasoned, but not irregular (para [35]). The only misdirection was with regard to the cumulative effect of the sentences imposed, which was found to be too harsh 'to the point where it can be said that they are startlingly inappropriate' (para [37]). In this regard, it was held that '[t]hese are the sort of sentences that are imposed to deter serious crimes involving violence — and then only rarely. They are far out of kilter with the effective sentences that have been imposed for multiple counts of stock theft involving large numbers of small stock. They must be interfered with . . .' (para [37]).

The appeals against the sentences subsequently succeeded and the first and second appellants were sentenced to an effective term of fourteen years' imprisonment and the third appellant to an effective term of sixteen years' imprisonment (para [40]).

*White-collar crime*

In an appeal by the state in terms of section 316B of the Criminal Procedure Act 51 of 1977, Justice Navsa, writing for the majority of the Supreme Court of Appeal in *S v Brown* 2015 (1) SACR 211 (SCA) not only criticised the sentencing court for the number and nature of interventions during the proceedings (paras [126]-[145]), but also held that the

> sentence imposed by the court tends toward bringing the administration of justice into disrepute. Less privileged people who were convicted of theft of items of minimal value have had custodial sentences imposed. We must guard against creating the impression that there are two streams of justice; one for the rich and one for the poor (para [121]).

The accused in this case pleaded guilty and was convicted on two counts of fraud and sentenced to a fine or R75 000 or eighteen months' imprisonment for each of the convictions. A further eighteen months' imprisonment on each of the convictions was imposed but suspended for four years on condition that the accused is not again convicted of the crime during the period of suspension (para [92]). In evaluating this sentence Justice Navsa held that the court had erred in finding that the convictions were not that serious and that the offender's moral blameworthiness was limited (para [116]). It was also held that the court had erred in holding that section 51(2)*(a)* of Act 105 of 1997 did not apply

(para [117]). The sentences were consequently set aside and substituted with the prescribed minimum sentence of fifteen years' imprisonment on each count of fraud. The sentences were ordered to run concurrently (para [125]).

Compare with *S v Grobler* 2015 (2) SACR 210 (SCA).

*Murder and specific cultural and religious beliefs relating to sangoma practices*

The appellant in *Mogaramedi v S* 2015 (1) SACR 427 (GP) was a practising sangoma and as part of his final initiation, he killed a close family relative and removed her genital organs (para [4]). He subsequently pleaded guilty to murder and was sentenced to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (para [1]).

Appealing against his sentence the appellant submitted that the sentencing court had ailed sufficiently to take into account the role that his practice as a sangoma and his belonging to a particular cultural community had played in the commission of the offence (paras [13]-[20]). However, Justice Dosio, writing for the majority of the North Gauteng High Court, Pretoria, did not agree that the appellant's particular cultural and religious beliefs constituted substantial and compelling circumstances that warranted a deviation from the prescribed minimum sentence. It was held that section 51(3)*(a)* of the Criminal Law Amendment Act specifically excludes a person's cultural and religious beliefs from amounting to substantial and compelling circumstances and it was evident from a review of case law involving offences related to witchcraft and muti-killings, that an offender's belief in witchcraft and practice as a sangoma cannot be regarded as mitigating factors with regard to sentencing (paras [27]-[31]). Justice Dosio furthermore held that given the strong cultural beliefs surrounding traditional healers in South Africa, it was the task of the court to deter the killing of innocent people for the purpose of muti. He held that 'to regard such killings as substantial and compelling circumstances would send out the wrong message to the community' (para [35]). The appeal against the sentence was consequently dismissed (para [38]).

## Section 280 of the Criminal Procedure Act 51 of 1977

Sentencing courts are granted a wide discretion to order that sentences run concurrently or consecutively. The basic guiding principle is fairness and the appropriateness of the effective

sentence. A conclusion that the cumulative effect of sentences will lead to a disproportionately severe sentence will normally be an indication that sentences should rather be served concurrently.

*A sentencing court's discretion to consider the cumulative effect of sentences imposed*

In *Mopp v S* (CA&R38/2015) [2015] ZAECGHC 136 (25 November 2015), Judge Goosen of the Eastern Cape High Court, Grahamstown, reasserted the general principle that it is for the sentencing court to consider the cumulative effect of sentences and to decide whether the sentence it imposes ought to be served either in whole or in part concurrently with a previously imposed sentence (para [7]). Likewise, section 280 of the Criminal Procedure Act 51 of 1977 also provides for the concurrence of sentences where an accused has been convicted of multiple offences by the court (paras [6] [8]).

In deciding whether or not to exercise its discretion, a sentencing court will consider the following factors: the nature of the previously committed offence and whether it shares elements with the offence for which the accused is being sentenced; the proximity in time between the commission of the different offences and the circumstances of the previous conviction; the overall objects of the sentence imposed; and the court will seek to achieve a balance between the competing interests of the accused, the complainant and the interests of society. Finally, the court will also 'tinge its sentence with mercy' (para [9]). An appeal court will furthermore only interfere with the sentence of the trial court if the sentence is vitiated by irregularity, a material misdirection, or where there is a striking disparity between the sentence imposed and the sentence that the appeal court considers appropriate (para [10]).

It was evident from the record of the matter under discussion here that the trial magistrate had indeed exercised his discretion in this regard, and that this discretion had been reasonably exercised — the test being whether the sentence imposed, having regard to the cumulative effect of the two sentences, induces a sense of shock (paras [17] [18]). Judge Goosen ultimately held that 'the appellant is required to serve a period of twenty-three years' imprisonment for two separately committed offences involving violence and in which one of the victims lost his life'; this, in his view, was not 'shockingly inappropriate or disproportionate punishment' (para [18]).

Also see *S v Mthetwa & others* 2015 (1) SACR 302 (GP) and *S v Motloung* 2015 (1) SACR 310 (GJ).

*Bringing into operation an earlier suspended sentence and ordering for it to run concurrently with a new or any other sentence*

Section 280(2) of the Criminal Procedure Act 51 of 1977 provides that sentences of imprisonment will generally commence the one after the expiration, setting aside or remission of the other, in such an order as the court may direct, unless the court orders that such sentences of imprisonment, or part thereof, shall run concurrently. Section 297(9)*(a)* of the Criminal Procedure Act 51 of 1977 further provides for a suspended sentence to be brought into operation where any condition imposed has not been complied with. Section 297(9)*(a)*(ii) specifically requires that such a suspended sentence be brought into operation by the court which suspended the operation of the sentence or any court of equal or superior jurisdiction. An anomaly created by these two provisions is, therefore, that a court that brings into operation an earlier suspended sentence in terms of section 280(2) of the Criminal Procedure Act 51 of 1977 is not empowered to order that the sentence run concurrently with a new or any other sentence. A 'trial court', on the other hand, which convicts an accused of a subsequent offence which invokes the enforcement of a previously suspended sentence, may order its sentence (the new sentence) to run concurrently with the previously suspended sentence (para [2.3] of *S v Chake* (130/2014; 19/860/10) [2015] ZAFSHC 185 (12 October 2015); also see *S v Mawatla* 1979 (2) SA 839 (O); *S v Osborne* 1981 (3) SA 645 (C); *S v Mothibi* 1982 (4) SA 49 (NCD); *S v Govender* 1986 (4) SA 972 (N); *S v Chabalala* 1988 (1) SACR 203 (OPD); *S v Breytenbach* 1988 (4) SA 486 (T); *S v Hoffman* 1992 (2) SACR 56 (C); and *S v Brand* unreported case no 343/2010 Free State High Court, 29 July 2010).

This anomaly was considered in *S v Chake* (130/2014; 19/860/10) [2015] ZAFSHC 185 (12 October 2015)). The accused in this case was eighteen years of age in 2010 when he was sentenced to one years' imprisonment wholly suspended for five years in terms of section 297(1)*(b)* of the Criminal Procedure Act 51 of 1977. This suspended sentence was brought into operation in 2014 by the District Court: Bloemfontein in terms of section 297(9)*(a)*(ii), and the presiding officer decided to apply section 280(2) of the Criminal Procedure Act 51 of 1977 due to the

special circumstances of the case and to allow for the 2010 sentence imposed to run concurrently with the sentence that caused the suspended sentence to be put into operation (para [2.1]). The magistrate submitted her decision to invoke section 280(2) to order concurrency for special review and stated that 'the narrow interpretation of the ''court'' referred to in section 280 as ''the trial court'' brings about unfair and unconstitutional consequences for the accused' (para [2.4]).

In order to determine whether the precedent indeed results in injustice and unconstitutionality by constraining or curbing the power of the court which puts the suspended sentence into operation, Judge Murray, writing for the majority of the Free State High Court, Bloemfontein, found it imperative to first examine the origin, interpretation and present application of section 280 of the Criminal Procedure Act 51 of 1977, in view of the Constitution and also in terms of its interaction with other provisions of the Act such as sections 297 and 275 (paras [4.1]-[6.11]).

The purpose of section 280 of the Criminal Procedure Act 51 of 1977 is to prevent a too severe cumulative effect where more than one sentence is imposed (para [4.1]). The precedent that only the 'trial court' has jurisdiction to order concurrency has its origin in *S v Strydom* 1967 (2) SA 386 (N) where it was held that 'this court in that sub-section is without doubt the court referred to in sub-section (1), that is to say, the trial court passing sentence at the conclusion of the trial' (387C–F of the *Strydom* case and as quoted in the case under discussion para [4.5]). Thus, the 'trial court' has since been interpreted as the court convicting the accused of breaching the suspended conditions and only that court is competent to order the concurrent running of its own sentence with the earlier suspended sentence that has been brought into operation and not *vice versa* (para [4.6]).

However, Judge Murray did not agree with this interpretation of the *Strydom* case. A careful reading of the case and its context reveals that what Judge Caney actually indicated was that there are two competent courts which may order concurrency in terms of section 280(2), namely the court *a quo* which originally imposed the suspended sentence, and the court*(s)* convicting and sentencing the accused for the breach of the suspended condition. But each of these competent courts can only order the concurrent running of its own sentence with that of the previous court's sentence and not *vice versa*. Therefore, the court bringing the suspended sentence into operation is not competent to make

a concurrency order in respect of the sentence first imposed (para [4.11]).

The function of section 297 of the Criminal Procedure Act 51 of 1977 is to assist a court in imposing a proportional sentence in cases where a court tries an accused for an offence which amounts to a breach of the suspensive condition (para [6.2]; also see *S v Breytenbach* 1988 (4) SA 286 (TPD) and *S v Hoffman* 1992 (2) SACR 56 (C)). However, if the sentence is put into operation by a court which does not have the necessary jurisdiction, an irregularity is committed (para [6.7]). However, Judge Murray held the view that if the original sentencing court which imposed the suspended sentence were allowed to give directions or to impose conditions on how the sentence was to be brought into operation in future, 'it would certainly fetter the sentencing direction of the court that needs to consider the cumulative effect of the multiple sentences, whether that be the ''trial court'' which sentences the accused for breaching the suspensive condition, or the court which now, some time after the suspended sentence was imposed, needs to put it into operation after conducting a full judicial enquiry into the current circumstances of the accused' (para [6.9]).

The court therefore agreed with the magistrate who had submitted this matter for special review: 'Section 297(9) triggers the circumstances described in section 280(1) and that the provisions of section 297 provides the enforcing court with the same jurisdiction as the section 280(1) court to impose a competent punishment in the appropriate circumstances . . . ''the court'' in section 280(2) therefore refers not only to the ''trial court'' which imposes the triggering sentence, but also to the court which subsequently puts the suspended sentence into operation if the trial court failed to apply section 280(2)' (para [6.11]).

Finally, with regard to the principles which a trial court must apply after conviction and in imposing a just sentence that brings into operation a suspended sentence, it was held that the process is similar to that applied during section 297 proceedings, and that it requires the following factors to be taken into consideration (para [7.1]): first, the court hearing the application for putting a suspended sentence into operation has a discretion and is not bound upon a breach of the conditions of suspension to grant the application (para [7.3]; also see *S v Peskin* 1997 (2) SACR 460 (C)); the reasonableness of the suspended sentence as well as the condition of suspension must also be taken into

consideration (para [7.4]); and the circumstances of the offence committed in breach of the conditions of suspension and the purpose of suspending a sentence, i e to serve as a deterrent for similar future criminal behaviour and an incentive for rehabilitation must be considered, especially if it appears that additional punishment would no longer serve a rehabilitative or deterrent purpose (para [7.5]). Further, before such a suspended sentence is put into operation, the person concerned must be afforded an opportunity to address the court and to lead evidence (para [7.9]).

With regard to the interaction between sections 280, 297 and 275 of the Criminal Procedure Act 51 of 1977, it was held that 'whichever court is the last one to apply its sentencing discretion, needs to keep the ''cumulative effect'' or ''totality principle'' in mind, for unless concurrency is ordered, the formerly suspended sentence will be tagged onto the end of the triggering sentence and may result in disproportionate punishment. For that reason . . . ''the court'' in section 280 needs to include an enforcing court (section 297) and a substituting court (section 275)' (paras [7.18] [9.10]).

Also see *S v Jwara* (A841/2015) [2015] ZAGPPHC 890 (12 November 2015) where it was held that it is competent for a court to direct that a sentence of imprisonment without the option of a fine run concurrently with a sentence of a fine with alternative imprisonment in terms of section 280(2) of the Criminal Procedure Act 51 of 1977 (para [6]).

### Previous Convictions

In *Thorne v S* (5/1595/2015) [2015] ZAWCHC 52 (23 April 2015), the question of the consideration of previous convictions in deciding on an appropriate sentence was considered. The accused in this case, a 42-year-old male, was convicted on a charge of theft after he pleaded guilty to stealing seven blocks of cheese valued at R287,75 from a local supermarket (para [1]). After the prosecutor presented the court with a list of previous convictions against the accused, and the accused had been given the opportunity to address the court, the magistrate continued to sentence the accused to a period of twelve months' imprisonment and an additional twelve months' imprisonment suspended for a period of five years on condition that the accused is not again convicted of theft or attempted theft during the period of suspension (para [1]).

On automatic review before Judge Henney of the Western Cape High Court, Cape Town, this sentence was found to be disproportionate. First, in considering the list of previous convictions of the accused, it was evident that the first two convictions, which were also on counts of theft, were respectively imposed seventeen and eighteen years before this most recent conviction. Thereafter, a period of fourteen years lapsed before the accused was convicted of an unrelated offence, namely possession of drugs (para [7]). This was followed by three further unrelated convictions, two convictions for contempt of court as the accused failed to appear in court, and one conviction for contravening section 17 of the Domestic Violence Act 116 of 1998 (para [8]). The last conviction, which was in December 2014, was again for the crime of theft (para [9]).

In addition to the observance of the time lapses between the various convictions, as well as the highlighting of the convictions for unrelated offences, Judge Henney also noted that, in terms of section 271A of the Criminal Procedure Act 51 of 1977, the first two convictions of theft had already lapsed for the purpose of considering them as previous convictions for sentencing (paras [9] [10]). The reason was that the previous convictions for the thefts committed in 1996 and 1997 automatically lapsed after a period of ten years in terms of section 271A, and the accused was not convicted of another offence during this period 'in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine was imposed' (para [10]).

## Parole

Parole is an administrative function governed by the Correctional Services Act 111 of 1998. In essence it entails the release on probation or parole of a sentenced prisoner, normally subject to certain conditions. The Act provides for the relevant oversight and structures, including the important role of the Parole Board. The cases below illustrate the grounds upon which applicants can take decisions by the Commissioner of Correctional Services, the Minister of Justice and Correctional Services and other role-players on review.

### *Placement on parole*

The applicant in *Van der Merwe v Minister of Justice and Correctional Services & others* (89493/2015) [2015] ZAGPPHC

828 (9 December 2015) was sentenced to death, a sentence that was commuted to life imprisonment in 1986 (para [2]). When the urgent application for his release on parole, or alternatively on day parole, was heard before the North Gauteng High Court, Pretoria, the applicant had been imprisoned for more than 30 years, as he had been arrested for the offences committed on 31 August 1985 (para [2]). With this application, the applicant applied for the decision of the Minister of Justice and Correctional Services to be reviewed and set aside, denying that he be placed on parole or day parole, despite contrary recommendations made by the Parole Board and the Case Management Committee of the Correctional Centre where he was being held (paras [1] [3]).

From the record it emerged that the Minister of Justice and Correctional Services, in making his decision, took into consideration, inter alia, two affidavits made by family members of the applicant, and which placed on record that the applicant had threatened them. These two affidavits were, however, never placed before the Parole Board or the Case Management Committee to consider, nor was the applicant afforded an opportunity to respond to the allegations they contained (para [4]). Moreover, the Parole Board and the Case Management Committee were never asked by the Minister whether they had consulted with the victims of the applicant's crimes, although this was offered as one of the reasons for not granting him parole (paras [4]-[7]).

In considering the history of the applicant's case which showed that the Parole Board and the Case Management Committee had previously also recommended the applicant for parole and that the Minister, in each of these instances, also did not take on board their recommendations, Judge Pretorius of the North Gauteng High Court, Pretoria, concluded that 'it seems as if the applicant is doomed to a life in prison' (para [11]). Judge Pretorius highlighted that the applicant had been a model prisoner for 30 years 'with no blemishes on his record and [that he] became eligible for parole for the first time in 1996. However, he was only considered and recommended . . . 10 years after he had become eligible . . .' (para [12]). It was ultimately concluded that the applicant had not been treated fairly and that 'drastic measures' needed to be implemented in order to 'rectify the present situation urgently' (para [34]). It was, therefore, concluded that the necessary arrangements be made for the applicant to appear before the Parole Board, that all relevant facts be

placed before the Parole Board, and that the Board's recommendation be passed to the Minister who must make a decision based on the Parole Board's recommendation before 22 January 2016 (para [35]).

*Placement on medical parole*

Section 79(1)*(a)-(c)* of the Correctional Services Act 111 of 1998 provides for a sentenced offender to be considered for placement on medical parole if that offender is 'suffering from a terminal disease or condition or if such offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care' (*Derby-Lewis v Minister of Justice and Correctional Services* 2015 (2) SACR 412 (GP) (29 May 2015) para [7]). Two further requirements are set in that there must be a low risk of re-offending and that appropriate arrangements for the inmate's supervision, care and treatment must have been made within the community to which he or she is to be released (para [7]). The procedure for such an application for placement on medical parole is set out in the remainder of section 79 and its accompanying regulations. First, it is required that an application for medical parole be supported by a written medical report as well as an independent medical report in terms of section 79(3) of the Act (para [8]). The Medical Parole Advisory Board (MPAB) must then make a determination based on these medical reports, and by taking a number of factors and criteria into consideration. In terms of sections 79(5) and 42(2)*(d)* of the Correctional Services Act 111 of 1998 the MPAB is tasked to consider, inter alia, whether at the time of sentencing the presiding officer was aware of the medical condition for which medical parole is sought etc (para [9]). Regulation 29A(5) furthermore provides for criteria that the MPAB must consider in assessing whether the offender is suffering from a terminal disease or condition as set out in section 79(1)*(a)* of the Correctional Services Act 111 of 1998 (para [11]). With regard to cancer, the medical condition from which the applicant in this case was suffering, Regulation 29A(5)*(b)*(i) specifically requires that it must be a '[m]alignant cancer stage IV with metastasis being inoperable or with both radiotherapy and chemotherapy failure' (para [12]). (It is, however, in terms of Regulation 29A(6) also possible for the MPAB to consider other conditions not listed in Regulation 29A(5) (para [13]).) Once the MPAB has made a determination, it must make a recommendation to the Minister of

Justice and Correctional Services as to the appropriateness to allow for the applicant to be released on medical parole in accordance with section 79(1)*(a)* of the Act. The Minister, in turn, must consider a positive recommendation in terms of the conditions as stipulated in section 79(1)*(b)* and *(c)* and as was described above (para [14]).

The applicant in *Derby-Lewis v Minister of Justice and Correctional Services* 2015 (2) SACR 412 (GP) (29 May 2015) applied for an order placing him on medical parole in terms of section 79 of the Correctional Services Act 111 of 1998 (paras [2.2] [6]). According to the medical reports submitted, the applicant was suffering from lung cancer, heart failure, and hypertension (para [17]). The medical reports further indicated that the applicant's cancer was inoperable, and that there was no distal spread or metastasis. The MPAB also confirmed that while the applicant was receiving both chemotherapy and radiotherapy, he was 'clinically well and [still] able to perform his daily activities and inmate self-care'. It was further submitted that with regard to the staging of cancers, the applicant's illness was categorised as stage IIIB, and therefore did not satisfy the criteria as stipulated in the Act and as described above (para [18]). However, reports submitted by two independent medical specialists came to a different conclusion (paras [22]-[24]). The independent medical specialists diagnosed the applicant as suffering from stage IV cancer on the basis that the cancer had spread to his left adrenal gland (para [24]). In view of this difference in medical opinion, the MPAB recommended to the Minister that the applicant be placed on medical parole as his cancer could be staged at least at stage IIIB with a probable but inconclusive spread to the left adrenal gland (para [26]).

The Minister, however, decided not to approve the recommendation of the MPAB for the placement of the applicant on medical parole (para [27]). The Minister based this decision on the fact that it was not conclusive that the applicant's cancer had indeed reached stage IV, the applicant was not found to be physically incapacitated so as to severely limit his daily activity or self-care, and there was no indication that the applicant showed any remorse for the crimes he had committed (para [28]).

In reviewing this decision, Judge Baqwa of the North Gauteng High Court, Pretoria, emphasised that the applicant had never been given access to, nor given an opportunity to respond to all the information the MPAB had in its possession and on which it

had based its findings and recommendation (para [37]). This was particularly unfair as it was also clear from the reasons given by the Minister for his decision, that he had also taken all this information into account when reaching his decision (para [37]). This, it was held, falls foul of section 6(2)*(b)* of the Promotion of Administrative Justice Act (PAJA) 3 of 2000 which empowers a court or tribunal to judicially review the administrative action of the Minister on the ground that a mandatory and material procedure or condition prescribed by an empowering provision had not been complied with (paras [41] [42]). This principle of *audi alteram partem* was furthermore held as a basic tenet of South African law that exists over and above the provisions of the PAJA (para [42]).

This flawed nature of the process, according to Judge Baqwa, could not be cured and in considering what relief would be appropriate given the circumstances — which included a very poor prognosis of only six months to live by the two independent medical specialists — it was held that the applicant be placed on medical parole (paras [45] [63]). Further delay, it was held, would cause 'unjustifiable prejudice to the applicant whose life is already precariously poised according to the medical evidence presented in this application' (para [60]). The conditions under which the applicant was to be released were left to the Minister and the MPAB to decide (para [64]). More generally, with regard to the interpretation of the provisions of section 79 of the Correctional Services Act 111 of 1998, it was held that the 'provisions ought not to be applied in a rigid manner or be read like a mathematical equations' (para [58]).

Also see *Paddock v Correctional Medical Practitioner, St Albans Medium B Correctional Centre & others* 2015 (1) SACR 200 (ECP).

### *Anon-parole period in terms of section 276B(1) of the Criminal Procedure Act 51 of 1977*

In *Strydom v S* (20215/14) [2014] ZASCA 29 (23 March 2015), the appellant was sentenced to a term of five years' imprisonment upon a conviction on 36 charges of fraud (para [1]). The presiding officer of the Gauteng Regional Court (Specialised Commercial Crime Court) further ordered that the appellant serve at least three years of her five-year term before being placed on or before being considered eligible for placement on parole (para [1]). This proviso was made in terms of section 276B of the

Criminal Procedure Act 51 of 1977 which allows for a court to fix a period during which a convicted offender shall not be placed on parole, where that court has sentenced that offender to a term of imprisonment for a period of two years or longer. This fixed non-parole period may further not exceed two-thirds of the term of imprisonment or a period of 25 years, whichever is shorter (para [10]).

From the record it transpired, however, that the appellant was not provided with an opportunity to address the court when the magistrate invoked section 276B of the Criminal Procedure Act 51 of 1977, and the magistrate also did not give any reasons for his decision in this regard (para [11]). This failure to afford the appellant an opportunity to address the court before fixing a non-parole period, and the failure of the magistrate to provide reasons for invoking section 276B of the Criminal Procedure Act 51 of 1977, were found to constitute a misdirection (para [11]). In *Stander v S* 2012 (1) SACR 537 (SCA), it was held that section 276B of the Criminal Procedure Act 51 of 1977 should only be invoked when the circumstances of the particular case so warrant (para [20] of the *Stander* case). Factors that a court should take into consideration in this regard include the particular circumstances of the case, and, as it relates to parole specifically, any aggravating factors pertaining to the commission of the crime. A proper evidential basis must furthermore be laid for a finding that such circumstances exist so as to justify the imposition of a fixed non-parole period (para [15], referring to para [20] of the *Stander* case). Judge Pillay writing for the majority of the Supreme Court of Appeal, added that '[s]uch an order should only be made in exceptional circumstances which can only be established by investigation and a consideration of salient facts, legal argument and perhaps further evidence upon which such a decision rests' (para [16]; also see *Mthimkulu v S* 2012 (2) SACR 89 (SCA)).

Also see *Selli v S* (220/15) [2015] ZASCA 173 (26 November 2015).

### *Cause of action for damages upon re-arrest and detention after being placed on parole erroneously*

The question in *Bhalithafa v Minister of Correctional Services* (1166/2013) [2015] ZAECMHC 46 (9 April 2015) was whether a person serving a sentence in prison has a cause of action for damages if he is re-arrested without a warrant or a court order consequent upon his erroneous release on parole (para [1]).

The plaintiff in this case was serving an effective term of 25 years' imprisonment for culpable homicide and murder (para [2]). While still serving his term of imprisonment, the Correctional Services Parole Board considered him for placement on parole. This decision was provisional and subject to the outcome of a restorative justice programme which entailed, inter alia, that the victims of his crimes be informed of his release on parole (para [3]). Unfortunately, the restorative justice component of the parole decision was never complied with and the plaintiff was erroneously released on parole (para [4]). Upon a complaint launched by the victims of the crimes committed by the plaintiff, the Board cancelled the plaintiff's parole and he was re-arrested and detained until a later date when he was properly released on parole (para [4]). The plaintiff now claimed damages for his alleged wrongful arrest founded on the absence of a warrant or court order justifying his arrest (para [5]).

Since the plaintiff commenced serving his sentence of 25 years' imprisonment on 9 April 2003, the provisions of the Correctional Services Act 8 of 1959 applied to his release on parole and sections 63 and 65 of this Act specifically require that a Parole Board first submit its recommendations to the Commissioner of Correctional Services or the Minister and only once the Commissioner or the Minister had approved the report and recommendations, could the prisoner be released on parole. Moreover, the provisional release of a prisoner subject to compliance with a restorative justice programme is not provided for in terms of the 1959 Act and its regulations (para [8]). It was consequently found that the plaintiff in this matter had not been lawfully released in terms of the legislative framework applicable to his sentence and possible release on parole, and that he was therefore 'not a free man' until he had finished serving his sentence. His re-arrest to continue serving his sentence until he was properly released on parole was therefore found to be in accordance with the provisions of the 1959 Act and its regulations (para [9]; compare with *Kommissaris van Korrektiewe Dienste v Malaza* 1996 (1) SA 1143 (WPA)). For this reason, it was held that the plaintiff's re-arrest could not be construed as illegal and that he had no viable claim for damages (para [11]).

*Invoking parole already granted*

The applicant in *Du Preez v Minister of Justice and Correctional Services* 2015 (1) SACR 478 (GP) was convicted of murder and

sentenced on 18 January 2005 to twelve years' imprisonment (para [3]). On 27 January 2014, the Correctional Supervision and Parole Board of the Kgosi Mampuru II Prison approved the applicant's release on parole. However, only five days after his release, information was published in the media relating to the illegal activities of the applicant whilst he had been incarcerated. It came to light that the applicant had smuggled alcohol into the prison and held a party in his cell shortly before he was to be released on parole (para [4]). As a result, the applicant was re-arrested in terms of section 70(1)*(a)*(ii) of the Correctional Services Act 111 of 1998 and his parole revoked for a period of one year (para [5]).

The applicant thereafter sought a declaratory order declaring, inter alia, that the second respondent had no jurisdiction to revoke his parole and that the applicant was to be released from incarceration and his parole conditions be re-established (para [1]). The applicant argued that his conduct in prison did not amount to a violation of his parole conditions and was not covered by section 70 of the Correctional Services Act 111 of 1998. Section 70 deals only with breaches of parole conditions of offenders who have been released on parole and are outside the confines of prison. The applicant argued that his conduct in prison amounted only to a disciplinary violation, the sanction for which was not covered by section 70 of the Act (para [7]).

On the question of whether the applicant's parole could be revoked for transgressions committed whilst in incarceration and prior to his release on parole, Justice Mavundla of the North Gauteng High Court, Pretoria, held that the applicant, despite being on parole, remained a sentenced prisoner and had no right to parole and consequently no right to resist its revocation (para [9]). It was further held that the National Commissioner had a wide discretion to decide when to grant parole and also to decide when to revoke it. In exercising this discretion, the National Commissioner may take into consideration any factor which comes to his attention, including 'past conduct of the parolee, brought to light subsequent to his release from incarceration' (para [9]). Given the nature and gravity of the applicant's transgressions and conduct, Justice Mavundla ultimately held that it was proper and just not to interfere with the decision of the National Commissioner to have the applicant's parole revoked (para [15]).

### Reconsideration of the Sentence of a Declared Dangerous Criminal in Terms of Section 286 of the Criminal Procedure Act 51 of 1977

The accused in *S v Bashford* (CC54/94) [2015] ZAGPPHC 146 (13 March 2015) was convicted of murder and theft and after relevant evidence had been presented, including an enquiry and unanimous finding by a team of psychiatrists, he was declared a dangerous criminal in terms of section 286A of the Criminal Procedure Act 51 of 1977 (paras [1] [2]). This declaration was made on the basis that the accused showed anti-social personality traits, that he represented a danger to the physical or mental well-being of other persons, and that there was a need for the community to be protected against him (para [2]). Following this declaration, the accused was sentenced to undergo an indefinite period of imprisonment subject to a direction that he be brought before the court on a later specified date (para [2]).

In terms of section 286B(4) of the Criminal Procedure Act 51 of 1977, a court has three options when a prisoner, who has been declared a dangerous criminal and who has been imprisoned for an indefinite period subject to a return date, is brought for a reconsideration of the sentence: the court may confirm the sentence for an indefinite period and set another return date; it may convert the sentence into correctional supervision; or it may order the release of the prisoner unconditionally or on such conditions as it deems fit (para [4]).

The correct approach in reconsidering such a sentence is also based on the 'Zinn-triad' as set out in *S v Zinn* 1969 (2) SA 537 (A) where it was found that if there is no merit in extending the prisoner's indefinite sentence, regard must be had to the seriousness of the crimes and other relevant factors including his or her conduct whilst in prison, mental state, possible rehabilitation as well as relapse into crime, and any training or other programmes completed (para [13]).

### A Sentence of Imprisonment Wholly Suspended and Section 85(1) of the Child Justice Act 75 of 2008

The accused in *S v Singana* (CA&R 54/2015) [2015] ZAECPEHC 9 (4 March 2015) was seventeen years old when he committed the offences of housebreaking with the intent to steal and theft (para [4]). He was duly convicted in the magistrate's court and sentenced by the Regional Court to 24 months'

imprisonment wholly suspended for five years on condition that he is not convicted of 'housebreaking with the intent to steal and theft or theft during the period of suspension'. The accused was also sentenced to a further 24 months' correctional supervision, subject to specific conditions as set out by the sentencing court (para [3]). Confusion ensued, however, as to whether this matter was subject to automatic review in terms of section 85 of the Child Justice Act 75 of 2008.

Section 85(1) of the Child Justice Act 75 of 2008 was amended by the Judicial Matters Amendment Act 42 of 2013 and now provides that where a child has been sentenced to any form of imprisonment or any sentence of compulsory residence in a child and youth care centre providing a programme as set out in section 191(2)*(j)* of the Children's Act 38 of 2005, that the sentence is subject to review in terms of section 304 of the Criminal Procedure Act 51 of 1977. Section 302 of the Criminal Procedure Act 51 of 1977 governs automatic review and section 302(1)*(a)*(i) specifically states that where a child has been sentenced to any form of imprisonment or any sentence of compulsory residence in a child and youth care centre providing a programme as set out in section 191(2)*(j)* of the Children's Act 38 of 2005 and such term exceeds a period of three months, and was imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or the term exceeds a period of six months and was imposed by a judicial officer who has held a substantive rank of magistrate or higher for a period of seven years or longer, that such a sentence shall be subject to review by a judge of the provincial or local division having jurisdiction (para [8]).

Thus, the amended section 85(1) extends the protection of automatic review to children by providing for a qualified right to automatic review as explained above (para [9]). Judge Majiki of the Eastern Cape High Court, Port Elizabeth, held that this expanded protection also extends to a sentence of imprisonment that was wholly suspended (paras [11]-[14]; also see *Jaga v Donges NO & another*; *Bhana v Donges NO & another* 1950 (4) SA SA 653 (A)).

## Prisoners' Rights

In *Tshikane v Minister of Correctional Services & others* 2015 (2) SACR 99 (GJ) the rights of prisoners being transferred from

one prison to another in terms of section 43 of the Correctional Services Act 111 of 1998 was considered.

Section 43 of the Correctional Services Act 111 of 1998 provides that a sentenced prisoner must be housed at the prison closest to the place where he or she is to reside after release but with due regard to the availability of accommodation and facilities to meet the prisoner's security requirements. Provision is also made for the transfer of sentenced prisoners from one prison to another, and Regulation 25 under Chapter III of the Act provides that the reason for the proposed transfer must be conveyed to the prisoner to enable him or her to make representations in this regard. These representations must be recorded in writing. However, where the transfer is for security reasons, the prisoner need not be informed of the proposed transfer but must be given reasons for the transfer as soon as practicable thereafter (para [5]).

In emphasising section 35(2) of the Constitution — which provides for the rights of detainees, including sentenced prisoners — Justice Moshidi of the South Gauteng High Court, Johannesburg, also pointed out that the transfer of prisoners is a discretionary matter that is dependent on a number of factors and conditions (para [10]; also see *Minister of Correctional Services v Kwakwa* [2002] 2 All SA 242 (A), 2002 (4) SA 455 (SCA)). Yet, in this case the applicant was not notified of the proposed transfer, was not given the opportunity to make representations, and it was also evident that he was not transferred for security reasons but because of overcrowding in the Johannesburg Medium B Prison (para [10]). Moreover, the residuum principle clearly requires that prisoners be housed nearest to their *domicilium* (para [10]). It was also emphasised that urgent applications from prisoners contesting their transfers to other prisons are being brought with increasing frequency and that the guiding principles as set out in the legislation and regulations thereto must be followed to ensure that prisoners' rights are protected (para [15]).

### When Does the Question of Remorse Arise as a Factor in Sentencing?

The appellants in *Magingxa & others v S* (CA&R401/2014) [2015] ZAECGHC 104 (25 September 2015) were convicted of murder and each sentenced to life imprisonment (para [1]). On appeal against both conviction and sentence, Judge Goosen of the Eastern Cape High Court, Grahamstown, emphasised that

'[a]n accused person, even once convicted by a trial court, retains the right not to incriminate him or herself and is not obliged to admit any facts relevant to the conviction during the stage of sentencing' (para [29]). Thus, where an accused has maintained his or her innocence throughout the trial, any perceived 'failure' of that accused to take responsibility for the offence*(s)* and to express remorse during the sentencing stage cannot be considered an aggravating factor for the purpose of sentencing (para [29]).

The question of remorse as a factor in sentencing, it was held, only arises 'if the accused asserts an apology and therefore either expressly or inherently concedes involvement in the commission of the offence. When such positive expression of an apology is made, or when it is asserted that the inference must be drawn from other facts that there exists remorse, then (and only then) will the court evaluate it as a factor for the purpose of sentencing' (para [30]; also see *S v Matyityi* 2011 (1) SACR 40 (SCA) for the principles enunciated in this regard).

Also see *S v Mooketsi & another* 2015 (1) SACR 295 (NCK), where the appellants were so struck with remorse on the evening of having participated in taking money destined for automatic teller machines, hiding it, and pretending that they had been robbed, that they immediately confessed, and handed over the money on the following day. In this case, it was held that 'there was no doubt that the appellants were sincerely remorseful' (para [20]).